

UNITED STATES BANKRUPTCY COURT
DEPARTMENT 2
JUDGE LOUISE DeCARL ADLER, PRESIDING
THURSDAY, JANUARY 22, 2015

10:00 AM

1 - 11-11738-MM Ch 7 DUANE ALAN & CODY LYNNE NOSKO

TELE

MOTION FOR CONTEMPT AND SANCTIONS FILED BY DEBTORS (fr. 11/20/14)

Tentative Ruling: Continued to March 26, 2015 at 10:00 a.m., Department 1 to allow the parties to continue settlement discussions. Status report is due no later than March 19, 2015. As this matter has been pending since February 25, 2014, the parties should be prepared to set dates for an evidentiary hearing if a settlement is not reached by that date. Appearances at the January 22, 2015 hearing are excused.

ATTORNEY: STEPHEN C. HINZE (DUANE & CODY NOSKO)

ATTORNEY: FRANK A. MEROLA (ARCH SPECIALTY INSURANCE COMPANY)

2 - 11-16867-MM Ch 7 SIMON P & ALICIA IRENE DEARN

ADV: 12-90011

REJEANNE BERNIER v. ALICIA DEARN

STATUS CONFERENCE ON ORDER REGARDING MOTION TO DISMISS AND MOTION TO ABSTAIN FROM HEARING ADVERSARY PROCEEDING (fr. 11/6/14)

Tentative Ruling: Continued to January 29, 2015 at 2:00 p.m., Department 1. Counsel for defendant is file a status report no later than January 26, 2015, in particular addressing the motion to dismiss as discussed at the previous hearing. Appearances at the January 22, 2015 hearing are excused.

ATTORNEY: LISA C. CRAMER (ALICIA DEARN)

OTHER: REJEANNE BERNIER

3 - 12-06549-MM Ch 7 SAN DIEGO DOOR & WINDOW, INC.

ADV: 13-90260

LESLIE GLADSTONE, TRUSTEE v. ALAN HOLSAPPLE

PRE-TRIAL STATUS CONFERENCE (fr. 10/2/14)

ATTORNEY: CHRISTIN A. BATT (LESLIE GLADSTONE, TRUSTEE)

ATTORNEY: GARY A. QUACKENBUSH (ALAN HOLSAPPLE)

10:00 AM

4 - 12-06689-MM Ch 7 TREASURES, INC.

ADV: 14-90070 LEONARD ACKERMAN, TRUSTEE v. MARGE CARSON, INC.

TELE

PRE-TRIAL STATUS CONFERENCE (fr. 10/16/14)

Tentative Ruling: Continued to February 19, 2015 at 10:00 a.m., Department 1 to allow the parties to complete mediation and discuss settlement. If settlement is reached, a motion to approve it may be scheduled for that date. Otherwise, a status report is due February 12, 2015 and the parties should be prepared to set deadlines for discovery and dispositive motions.

ATTORNEY: DEAN T. KIRBY (LEONARD ACKERMAN, TRUSTEE)

ATTORNEY: BRADLEY D. BLAKELEY (MARGE CARSON, INC.)

5 - 12-16661-MM Ch 7 ALBERTO FLORES TORRES

ADV: 13-90085 ANGEL BAUTISTA & JOSE CARIAS & BERNARDO MUNOZ & JAVIER MUNOZ & JAVIER ORGANISTA & JOSE PALMA & JORGE REYES v. ALBERTO TORRES

PRE-TRIAL STATUS CONFERENCE (fr. 12/18/14)

Tentative Ruling: The parties should be prepared to set trial dates and set a deadline by which they will submit the undisputed statements of fact and the issues which need to be tried for the Court to prepare a pretrial order. See Castrol North America, Inc. v. Satkowiak (In re Satkowiak), Adv. Number 11-90377, Docket # 84 (statement of facts).

ATTORNEY: JAMES H. CORDES (ANGEL BAUTISTA, BERNARDO MUNOZ, JAVIER MUNOZ, JAVIER ORGANISTA, JORGE REYES, JOSE CARIAS, JOSE PALMA)

ATTORNEY: THOMAS B. GORRILL (ALBERTO TORRES)

6 - 13-03755-MM Ch 7 WILLIAM FRANCIS SLATTERY

ADV: 13-90257 PAUL MARKS & MICHELE SLATTERY v. WILLIAM SLATTERY

PRE-TRIAL STATUS CONFERENCE (fr. 11/20/14)

Tentative Ruling: Off-calendar; this case has been dismissed pursuant to the parties' stipulation, which was approved by this Court on December 12, 2014. Appearances at the January 22, 2015 hearing are excused.

ATTORNEY: PAUL DANIEL MARKS (PAUL MARKS & MICHELE SLATTERY)

OTHER: WILLIAM SLATTERY

7 - 13-08848-MM Ch 7 LIVIA GUERRERO

OPPOSITION TO MOTION FOR REDEMPTION OF PERSONAL PROPERTY
FILED BY TOYOTA MOTOR CREDIT CORPORATION (fr. 1/8/15)

ATTORNEY: JOHN A. VARLEY (LIVIA GUERRERO)

ATTORNEY: KEITH E. HERRON (TOYOTA MOTOR CREDIT CORPORATION)

10:00 AM

8 - 13-11264-MM Ch 7 KHATSAPHONE SOMSAMOUTH

ADV: 14-90023 SAYCHAI BOUNNAVONGSOR v. KHATSAPHONE SOMSAMOUTH

MOTION TO APPROVE SETTLEMENT AGREEMENT FILED BY PLAINTIFF
Tentative Ruling: Motion to Approve Settlement Agreement is approved. The Court finds that the *In re A&C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986), factors are satisfied as set forth in Debtor's uncontested motion to approve the settlement. Appearances are excused and counsel may upload an order.

ATTORNEY: DEEPALIE MILIE JOSHI (KHATSAPHONE SOMSAMOUTH)
OTHER: KHATSAPHONE SOMSAMOUTH

9 - 14-00601-MM Ch 7 JOE MANUEL & JO ANN LOUCAO

ADV: 14-90045 LINCOLN FINANCE COMPANY, INC. v. JO LOUCAO & JOE LOUCAO & PACIFIC COAST MOTORS, INC.

PRE-TRIAL STATUS CONFERENCE
Tentative Ruling: The parties should be prepared to set trial dates and set a deadline by which they will submit the undisputed statements of fact and the issues which need to be tried for the Court to prepare a pretrial order. See *Castrol North America, Inc. v. Satkowiak* (In re Satkowiak), Adv. Number 11-90377, Docket # 84 (statement of facts).

ATTORNEY: RICK KNOCK (LINCOLN FINANCE COMPANY, INC.)
ATTORNEY: AHREN TILLER (JO ANN & JOE LOUCAO)

10 - 14-06490-MM Ch 7 DWAYNE ALAN & ANNA-MARIE FERRIS

OPPOSITION TO MOTION FOR REDEMPTION FILED BY FORD MOTOR CREDIT COMPANY, LLC (fr. 12/18/14)

Tentative Ruling: Off-calendar. Debtor has withdrawn motion for redemption. Appearances are excused.

ATTORNEY: KRISTIN LAMAR (DWAYNE & ANNA FERRIS)
ATTORNEY: JOHN H. KIM (FORD MOTOR CREDIT COMPANY, LLC)

11:00 AM

1 - 14-09087-MM Ch 7 REBECCA HERRERA

ORDER TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED WITH A 180 DAY BAR IMPOSED (fr. 1/8/15)

OTHER: REBECCA HERRERA

2 - 14-06810-MM Ch 7 MIGUEL ANGEL & MARISOL DUARTE

REAFFIRMATION AGREEMENT BETWEEN DEBTORS AND BALBOA THRIFT & LOAN

ATTORNEY: CYNTHIA ENCISO (MIGUEL & MARISOL DUARTE)

11:00 AM

3 - 14-07094-MM Ch 7 FRANCISCO JAVIER & SUSANNA IDELL RUVALCAVA
REAFFIRMATION AGREEMENT BETWEEN DEBTORS AND SANTANDER
CONSUMER USA, INC. (fr. 12/11/14)

ATTORNEY: ALFRED GREENE (FRANCISCO & SUSANNA RUVALCAVA)

4 - 14-07430-MM Ch 7 WESLEY ROGER PIERSON
REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND SCHOOLS
FEDERAL CREDIT UNION

Tentative Ruling: The debtor was represented by counsel in negotiating the Reaffirmation Agreement with Schools Federal Credit Union, the creditor is a credit union, and counsel has executed a certification in support of the Reaffirmation Agreement. Therefore the Reaffirmation Agreement is effective and court approval of the agreement is not required. *See* 11 U.S.C. § 524(c); *Bay Federal Credit Union v. Ong (In re Ong)*, 461 B.R. 559, 564 (B.A.P. 9th Cir. 2011). The matter has been taken off calendar and no appearances are required.

ATTORNEY: LARISSA L. LAZARUS (WESLEY PIERSON)

5 - 14-07662-MM Ch 7 RICKY LANE & PIEDAD LOPEZ
REAFFIRMATION AGREEMENT BETWEEN DEBTORS AND SANTANDER
CONSUMER USA, INC.

ATTORNEY: RUBEN F. ARIZMENDI (RICKY & PIEDAD LOPEZ)

6 - 14-07816-MM Ch 7 BETTY JO JIMENEZ
REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND SANTANDER
CONSUMER USA, INC.

ATTORNEY: DANIEL WIEDECKER (BETTY JIMENEZ)

7 - 14-08452-MM Ch 7 GARY JAMES PARKER
REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND
HARLEY-DAVIDSON CREDIT CORPORATION

Tentative Ruling: Since there is no presumption of undue hardship, the Reaffirmation Agreement is approved and appearances are excused.

ATTORNEY: DAVID E. BRITTON (GARY PARKER)

11:00 AM

8 - 14-08505-MM Ch 7 **DEBORAH J FEUERBORN**

REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND AMERICAN HONDA
FINANCE CORPORATION

ATTORNEY: SANDRA SCHMIDT (DEBORAH FEUERBORN)

9 - 14-08797-MM Ch 7 **MARSHALL JAMES MURRAY**

REAFFIRMATION AGREEMENT BETWEEN DEBTOR AND SPRINGLEAF
FINANCIAL SERVICES

Tentative Ruling: The debtor entered into a reaffirmation agreement with Springleaf Financial Services and was represented by legal counsel. Because the debtor and Springleaf Financial Services renegotiated the interest rate and filed a new reaffirmation agreement, the Court finds there is no presumption of abuse. There is also not a presumption of undue hardship and counsel signed the certification as required by 11 U.S.C. § 524(c)(3). Therefore the reaffirmation agreement is effective (Docket #22) and does not require court approval. Taken off calendar. Counsel and debtor are excused from attending this hearing.

ATTORNEY: AJAY GUPTA (MARSHALL MURRAY)

02:00 PM

1 - 95-11446-LA Ch 7 **MARGARITA KOCHETOV**

DEBTOR'S MOTION TO REOPEN CHAPTER 7 CASE

Tentative Ruling: Motion to Reopen **DENIED**. Debtor seeks to reopen this 20 year old case to establish this debt owed to the EDD was discharged in 1996 when she received her discharge. Debtor was aware of this debt when she filed bankruptcy; she listed the EDD; and she discussed the claim with an EDD auditor, providing her with a copy of the bankruptcy petition. She met a number of times with the EDD post-filing and was aware they were proceeding with collection efforts. Yet she waited until 2013 when she hired legal counsel who unsuccessfully attempted to re-open this case (See ECF 12-15). She has again attempted to reopen this case *in pro per* in 2014 (See ECF No. 24-25, 30 and 32). Simultaneously she filed a Complt. (Adv. Pro. 14-90216) seeking damages and injunctive relief, claiming this debt was discharged in 1996.

The EDD opposes re-opening the case, claiming *laches* and unfair prejudice. It will require the EDD to delve into records and recollections that are 20 years old.

There is no automatic discharge of tax debts. If there was to be a challenge to the nondischargeability of the tax debt, it had to come from the debtor. *See In re Ellsworth*, 158 B.R. 856, 858 (M.D. Fl, 1993). As observed in *In re Kapsin*, 265 B.R. 778, 781 (Bankr. N.D. Oh., 2001)[in connection with a student loan debt] at some point the interest in finality outweighs the debtor's possible need to have the dischargeability of a debt under 11 U.S.C. Sec. 523(a)(8) determined by this court. In *Kapsin*, the Court found that bar to exist only 1 1/2 years after the case had been closed. Here, 20 years after the case has been closed, the interest in finality is even stronger.

ATTORNEY: THOMAS K. ATWOOD (MARGARITA KOCHETOV)

ATTORNEY: PETER NISSON (MARGARITA KOCHETOV)

02:00 PM

2 - 07-00849-LA Ch 7 VERONICA B. HALL

DEBTOR'S MOTION FOR ORDER SHOWING CAUSE FOR RESPONDENTS' VIOLATION OF THE DISCHARGE INJUNCTION PURSUANT TO 11 U.S.C. §524 AND REQUEST FOR DAMAGES, SANCTIONS, ATTORNEYS FEES AND COSTS FILED BY THOMAS K. SHANNER

Tentative Ruling: **MATTER CONTINUED to Feb. 12, 2015 at 2:00 p.m.** per request in counsel's declaration. Counsel to file a status report one week in advance of continued hearing if settlement agreement has not been filed.

Appearance excused at this hearing.

ATTORNEY: BRIAN J. MCGOLDRICK (VERONICA B. HALL)
ATTORNEY: THOMAS K. SHANNER (VERONICA B. HALL)

3 - 11-04720-LA Ch 7 J. DOUGLASS & PEGGY L. JENNINGS

ADV: 13-90072 LESLIE T. GLADSTONE v. APRIL M GIFFIN, ET AL

- 1) PRE-TRIAL STATUS CONFERENCE (Fr 12/18/14)
- 2) DEFENDANTS' MOTION TO STAY DISCOVERY PENDING DISTRICT COURT'S RULING FILED BY DONALD P. TREMBLAY

Tentative Ruling: Motion to Stay Discovery **DENIED**. FRBP 5011(c) states that a motion to withdraw reference does not stay the administration of any case or proceeding except the bankruptcy court finds cause to exercise discretion to do so. In other words, a stay is the exception and not the general rule.

Here, defendants have failed to meet their burden of showing a stay is proper. Trustee has settled her claims against La Jolla Equities and Tradewinds, leaving the action against these defendants remaining. Regardless of the jury demand, discovery must occur somewhere and it would be most efficient if that occurred in a court familiar with the facts/circumstances of this bankruptcy case and the adversary proceeding. Further, there is no irreparable harm demonstrated by defendants whereas this case has been pending 21 months without discovery being undertaken. If anything, the Trustee is the one for whom further delay would be prejudicial.

ATTORNEY: MICHAEL Y. MACKINNON (LESLIE T. GLADSTONE)
ATTORNEY: DONALD P. TREMBLAY (APRIL M GIFFIN, ET AL)

4 - 12-09140-LA Ch 7 ERIKA LOUISE RAYNES

MOTION TO COMPEL DEBTOR'S COOPERATION WITH TRUSTEE AND DETERMINE EXTENT OF TRUSTEE'S LIEN IN MARITAL SETTLEMENT AGREEMENT FILED BY TRUSTEE (Fr 12/4/14)

Tentative Ruling: A prior tentative ruling was posted in connection with this motion. At the hearing held 12/4/14, the court continued for additional briefing the limited issue of whether the funds set aside in the Wells Fargo bank account (initially \$50K) should be deemed POE and subject to the estate's lien pending turnover. Based on the facts developed in connection with the prior motion and the supplemental briefs/declarations, the Court concludes that the trustee's request for a lien on the Wells Fargo account must be **DENIED**.

First, the WF account did not exist on the petition date. The source of funds in the account was a post-petition loan taken out by Mr. Fecher against the former marital residence. The loan is solely his responsibility to repay. The property is titled in his name and is his separate property awarded to him in the prepetition divorce MSA. There is no order vacating that MSA so it remains the governing document at this procedural stage.

Further, although the family court may have intended to grant the trustee a lien on funds in the WF account to secure the estate's interest in receiving the \$50K equalizing payment, this intent was not articulated and did not become a court order. See Hrg. Transcript, 4/21/14, ECF #58, Ex. A at 31-37. Although there was discussion about granting a lien for the equalizing payment, no specific property was identified. Court declines to read into the family court judge's ruling an intent that is not readily apparent.

Regardless of whether the trustee has a lien, he has a property right to receive a \$50K equalizing payment in cash which is POE. This property right is embodied in the MSA, ECF #41-3, Ex. A, p. 11. The MSA has not been vacated. Debtor and Fecher cannot unilaterally stipulate to a new MSA that reduces or eliminates the estate's property right without the trustee's consent.

Finally, the parties do not dispute that any needs-based attorney fee must be paid to the debtor (or directly to her attorney) from Fecher's share of the marital property or his separate property. At this procedural stage, the funds in the WF account are Fecher's separate property and he is using them to pay expenses other than the \$50K equalizing payment, including a payment to his own attorney. Therefore it is clear that these funds are not "earmarked" as the trustee's argues. See Spears Dec., ECF #69-2 at para. 4; Fecher Dec. ECF #69-3, at para. 5. This ruling is without prejudice to the family court imposing a lien on the funds in the so-called trust account.

The prior tentative ruling is affirmed as modified by this ruling.

ATTORNEY: THOMAS B. GORRILL (ERIKA LOUISE RAYNES)

02:00 PM

5 - 12-14302-LA Ch 7 RICHARD WARREN TOWT

ADV: 13-90025 SHIRLEY EDWARDS v. RICHARD WARREN TOWT

- 1) PRE-TRIAL STATUS CONFERENCE (Fr 12/20/14)
- 2) PLAINTIFF'S MOTION TO STRIKE ANSWER AND FOR ENTRY OF DEFAULT FILED BY THOMAS D. MAURIELLO

Tentative Ruling: Motion to Strike Answer and Enter Default **GRANTED**. Unopposed. Prior to this Court granting defendant's counsel's request to withdraw, defendant had ceased all communication with his counsel. At the outset of this action, plaintiff served the defendant both personally and by mail with the summons and complaint at the address of records, Although defendant answered via his attorney, his attorney appeared at numerous pre-trial status conferences, stating that he could not communicate with his client. This motion was properly served on the last known address of the defendant--the address used by his own counsel in moving to withdraw. It is unopposed. Answer is stricken for failure to appear in defense of this action. Default entered. Plaintiff to submit declaration in support of damage request.

As this motion was unopposed, plaintiff's counsel is excused from appearing at this hearing. Hearing will go off calendar.

ATTORNEY: THOMAS D. MAURIELLO (SHIRLEY EDWARDS)

6 - 12-16323-LA Ch 7 HOSSEIN & CHRISTINE A. RABIYAN

- 1) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR R. DEAN JOHNSON, ACCOUNTANT, PERIOD: 2/4/2013 TO 11/3/2014, FEE: \$ 1423.00, EXPENSES: \$127.98. FILED BY R. DEAN JOHNSON

Tentative Ruling: Court has reviewed First and Final Application for Compensation and Expense Reimbursement filed by the accountant for the Ch. 7 trustee and finds services necessary and charges for same reasonable. Court awards amounts requested in full.

As this application is unopposed, Mr. Johnson is excused from attending this hearing and may submit an order forthwith.

- 2) FIRST AND FINAL APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FILED BY LESLIE T. GLADSTONE, CH. 7 TRUSTEE, PERIOD: 12/13/12 TO 1/22/15, FEES \$42,751.25 (PLUS ADD'L \$200.00 FOR CLOSING); COSTS \$154.34

Tentative Ruling: Court has reviewed Trustee's First and Final Application for Compensation and Expense Reimbursement and finds the statutory commission excessive in light of "extraordinary circumstances" of this case.

Trustee sold a house. She hired counsel (her own firm--which she is permitted to do), to assist her w/r/t legal services. The sale appears to have been uncomplicated--the property sold for \$813K, liens, commission and other expenses were paid and the sale netted approximately \$39,405.63. The amount netted was less than the trustee's Sec. 330 "commission." P. 1:21-2 of the Trustee's Application states: "The Trustee anticipates that this case will be administratively insolvent and the above fee [Trustee's request for the statutory commission of \$42,751] will not be paid in full."

As discussed in *In re Scoggins*, 517 B.R. 206, 226 (Bankr. E.D. Cal. 2014), Sec. 330(a)(7) requiring a court "treat" trustee compensation as a "commission" operates to create a rebuttable presumption that the maximum fee calculated under Sec. 326(a) is reasonable for purposes of Sec. 330 and 330(a)(1)(A). However, the court remains entitled to award less than the amount requested under Sec. 330(a)(2) where (as here)there are "extraordinary circumstances"--the fee requested is unreasonably disproportionate and does not provide for any distribution to unsecured creditors.

The court acknowledges that the trustee, as an act of *largesse*, offers to carve out and pay \$8K of the fee she is requesting to unsecured creditors--an act which would result in a scant 3% distribution to the claims timely filed. However, that offer does not result in a meaningful distribution.

The Court refers the trustee to a "fundamental principle" from the U.S. Trustee Handbook:

"A chapter 7 case must be administered to maximize and expedite dividends to creditors. *A trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals... The trustee must be guided by this fundamental principle* when acting as a trustee.. Accordingly, the trustee must consider whether sufficient funds will be generated to make a meaningful distribution to unsecured creditors, including unsecured priority creditors, before administering a case as an asset case." 28 U.S.C. Sec. 586.

U.S. Trustee HANDBOOK, ch.7 page 4-1 (emphasis added); *See also* A. Wolper, R. Switkes, et al, "Chapter 7 Monopoly: To Pass Go, Trustee Must

Pay 'Meaningful' Toll to Unsecured Creditors," 34 -Jan. Am. Bankr. Inst. J. 16 (Jan. 2015).

Based on the fee application filed by trustee's law firm who employs the same personnel who performed the work described in the trustee's fee application, application of a lodestar rate (based on the law firm's hourly rates) appears to the court to be generous as compensation to the trustee (for non-lawyer services) in this uncomplicated case. That fee would be \$11,300.50 and the Court will allow that. The request for \$42,751.25 will be disallowed, and reduced to the lodestar calculation for the reasons set forth above. Costs requested will be awarded in full.

- 3) FIRST AND FINAL APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FILED BY FINANCIAL LAW GROUP, ATTORNEYS FOR THE CH. 7 TRUSTEE, PERIOD: 7/1/13 TO 1/22/15, FEES \$8,407.00 (PLUS \$1,500 FOR CLOSING); COSTS \$ 418.55

Tentative Ruling: Court has reviewed First and Final Application for Compensation and Expense Reimbursement filed by counsel for the Ch. 7 trustee and finds services necessary and charges for same reasonable. Court awards amounts requested in full. The court denies the firm's request for an "up to" award of \$1500 for fees to close the case. There is nothing indicated as a complication in closing this case and a request of an additional 20% in fees to close the case is excessive. The Court will authorize the additional \$200 in costs.

As this application is unopposed, counsel is excused from attending this hearing and may submit an order forthwith.

ATTORNEY: THOMAS B. GORRILL (CHRISTINE A. RABIYAN, HOSSEIN RABIYAN)

02:00 PM

7 - 13-03699-LA Ch 7 DANIEL CHEN

NUNC PRO TUNC APPLICATION FOR AUTHORITY RETAIN GENERAL
COUNSELY FILED BY STEVEN R. HOUBECK

Tentative Ruling: **MATTER CONTINUED TO MAR. 5, 2015 at 2:00 p.m.** Service defects.

(1) Mr. Chen, the debtor, has not been served. Rather, service was made on Michael Yim-Yam Lo, purported counsel for the debtor. In a ruling made 11/6/14 (ECF 284, 285) this court denied Mr. Lo compensation as debtor's counsel since he never obtained an order approving his employment. That said, debtor appears to be unrepresented at this time. Since this appears to be a surplus estate with funds going back to debtor, at minimum Mr. Chen should be aware of counsel's effort to obtain npt employment and have an opportunity to object, if he does. Mr. Chen to be served forthwith with notice of continued hearing and opportunity to object together with all moving papers.

(2) Further, service defect in that movant has failed to serve all creditors and parties in interest. Proof of service of this motion will be required as well.

(3) Finally, movant has failed to discuss standards for *nunc pro tunc* employment and how he meets them. See *In re Atkins*, 69 F3d 970, 974-5 (9th Cir. 1995). If movant intends to supplement his motion with additional points and authorities, Court suggests he do so before serving this motion on Mr. Chen and other creditors, etc.

Appearance at this hearing excused.

ATTORNEY: MICHAEL YIN-YAM LO (DANIEL CHEN)

8 - 12-09553-LA Ch 11 SECURE INTERNET COMMERCE NETWORK, INC.

TRUSTEE'S OBJECTION TO CLAIM NO. 89 BY PRINCIPIA INVESTMENTS, LLC

Tentative Ruling: Trustee's Objection to Claim No. 89 **SUSTAINED IN PART; SET FOR EVIDENTIARY HEARING IN PART.**

Sustained as to objection that loans are usurious. These are styled as commercial loans and a loan of this type with a rate exceeding 10% is usurious. Cal. Const. Art. XV, Sec. 1(2); *Blue Growth Holdings Ltd. v. Mainstreet Ltd. Ventures, LLC*, 2013 WL 4758009, *3 (N.D. Cal, 2013). These notes have no savings clause so the penalty for usurious interest is no interest at all. See *Blue Growth*, at *2.

Set for evidentiary hearing: The following issues raised in the Opposition to the objection raise issues of fact which must be tried:

1. Whether the debts in the POC (the original note, the interest notes and the convertible note) were converted to equity.
2. Whether the Statute of Limitations has expired: The Original Notes and the Conversion Note do not clearly state the due date for payment, instead stating: "The loan due date will be as per original agreement." We do not have the original agreement.
3. Whether there is no liability or whether the notes lack consideration: The trustee contends she cannot locate cancelled checks for the 10/30/07 loan and the 7/2/08 loan but the POC attaches competing evidence of promissory notes between Principia and the debtor for the loan amounts and MEI's Loan Detail which may show loans from MEI's 401(k) account to Principia.
4. Whether this debt should be equitably subordinated: The precise relationship between Principia/MEI/the debtor and the Elliotts is the subject of a factual dispute. The trustee has presented sufficient evidence to raise a triable issue of fact whether these claims should be equitably subordinated.

Parties are to confer in advance of this hearing and develop a plan for discovery so that court can set discovery cut off dates.

ATTORNEY: JENNIFER E. DUTY (JEANNE GODDARD)
ATTORNEY: CRAIG E. DWYER (SECURE INTERNET COMMERCE NETWORK, INC.)
ATTORNEY: CARL H. STARRETT (PRINCIPIA INVESTMENTS, LLC)

9 - 14-02625-LA Ch 11 IGLESIA MONTE DE LOS OLIVOS, INC.

ORDER RE: CHAPTER 11 PETITION 1) SETTING STATUS CONFERENCE; 2) SETTING COMPLIANCE DEADLINES; AND 3) SETTLING SANCTIONS, IF APPROPRIATE, INCLUDING DISMISSAL, CONVERSION OR APPOINTMENT OF A CHAPTER 11 TRUSTEE OR EXAMINER BECAUSE OF NONCOMPLISNVR WITH ABOVE REQUIREMENTS (Fr 9/25/14)

ATTORNEY: DIANE H. GIBSON (IGLESIA MONTE DE LOS OLIVOS, INC.)

10 - 14-06227-LA Ch 13 SALVADOR FLORES GONZALEZ

- 1) FIRST APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR LESLIE T. GLADSTONE, TRUSTEE CHAPTER 7, PERIOD: 7/31/2014 TO 11/17/2014, FEE: \$ 2,488.50, EXPENSES: \$34.40.

Tentative Ruling: Court has reviewed First and Final Application for Compensation and Expense Reimbursement filed by the Ch. 7 trustee in this converted case and finds services necessary and charges for same reasonable. Court awards amounts requested in full.

As this application is unopposed, Ms. Gladstone is excused from attending this hearing and may submit an order forthwith.

- 2) APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FILED BY ORG CONSULTING, CONSULTANT AND APPRAISER FOR TRUSTEE, PERIOD: 9/30/14 TO 11/12/14, FEES \$1,162.00

Tentative Ruling: Court has reviewed Application for Compensation and Expense Reimbursement filed by ORG who performed an appraisal on the debtor's business at the trustee's request. However, the trustee never sought authorization to employ ORG at the expense of the estate. Consequently, the Court will deny this request without prejudice to seeking npt approval for ORG's employment.

If ORG is prepared to accept the tentative ruling, its representative should contact the courtroom deputy and appearances will be excused.

ATTORNEY: ALBERTO M. CARRANZA (SALVADOR FLORES GONZALEZ)

11 - 13-07137-LA Ch 13 RICHARD J THIRAKUL

MOTION FOR RELIEF FROM STAY, RS # MJ 01 .00 FILED BY MICKEY JEW ON BEHALF OF EASTRIDGE CONDOMINIUM CORPORATION, A CALIFORNIA NON PROFIT MUTUAL BENEFIT CORPORATION

Tentative Ruling: According to debtor's counsel statement (ECF #33) debtor has offered to bring the account current together with HOA regular assessment fee due 2/15. If this offer is acceptable to movant, he should notify counsel for the debtor and the courtroom deputy and appearances will be excused.

In that event, counsel for debtor shall be awarded the guideline fee requested for his services.

ATTORNEY: THOMAS K. SHANNER (RICHARD J THIRAKUL)

12 - 13-12285-LA Ch 7 ROBERT BOLADIAN

ADV: 14-90142

JAMES R. CASSIDY & JAMES JUSTICE & DAVID HURTADO & PANTA RAY INVESTMENTS, LLC v. ROBERT BOLADIAN

PRE-TRIAL STATUS CONFERENCE

ATTORNEY: JOHN L. SMAHA (DAVID HURTADO, JAMES JUSTICE, JAMES R. CASSIDY, PANTA RAY INVESTMENTS, LLC)
ATTORNEY: JEFFREY S. KAUFMAN (ROBERT BOLADIAN)

13 - 14-04623-LA Ch 7 **SHARON COLLEEN BERRY**

DEBTOR'S MOTION SETTING EFFECTIVE DATE OF REAFFIRMATION AGREEMENT TO 9/25/14 WITH A FIRST PAYMENT DATE OF 10/25/14, OR IN THE ALTERNATIVE, RESCINDING AGREEMENT

ATTORNEY: DAVID A. POMERANZ (SHARON COLLEEN BERRY)

14 - 14-02949-LA Ch 11 **BRIAN DUNN**

stip to come to cont to 2/26 MOTION FOR RELIEF FROM AUTOMATIC STAY RS # CWS-1 RABOBANK, N.A. , FILED BY CLIFFORD STEVENS

Tentative Ruling: Motion for Relief from Stay **GRANTED**. Other than debtor's belief that the property can be sold for something in excess of movant's lien, there is no evidence contradicting the appraisal submitted by movant. Debtor's "belief" is neither supported by a declaration under penalty of perjury nor by a broker's price opinion or other appraisal evidence. Further debtor supplies no factual information that would cause this court to believe that this property is necessary for an effective reorganization. Debtor's financial information contained in his declaration in support of the Opposition is at odds with the facts set forth in his MOR [See, e.g., ECF #109]

Because movant has failed to serve the 20 largest creditors, Court is going to require that movant lodge with **11 day objection period** [consistent with r/s response time for debtor] an order granting the relief, with a notice that parties in interest served with the order who object to the relief must file an Opposition and request for hearing within the time provided by the notice.

ATTORNEY: BRIAN J. DUNN (BRIAN DUNN)

15 - 14-07189-LA Ch 11 **CHARLES ANDREW**

- 1) MOTION FOR ALLOWANCE OF INSIDER COMPENSATION & REIMBURSEMENT OF EXPENSES FILED BY CHARLES ANDREW

Tentative Ruling: While Court is sympathetic to the need for debtor to have compensation for household expenses, it does not appear that Debtor earns enough to pay budgeted expenses; nor is he current on post-petition expenses. UST has filed a limited objection stating that it has no objection provided debtor remains current on other post-petition expenses (a condition already violated--debtor is 2 mos. behind in house payments) and that payment would be subject to disgorgement if debtor unable to remain current--a condition which will be impossible for debtor to fulfill since he doesn't earn enough to disgorge.

Court believes this case should be dismissed and will be considering doing so at this hearing.

Debtor has not amended his MOR's as directed at the last hearing and his MOR's filed to date reflect no meaningful income.

- 2) ORDER RE: CHAPTER 11 PETITION 1) SETTING STATUS CONFERENCE; 2) SETTING COMPLIANCE DEADLINES; AND 3) SETTING SANCTIONS, IF APPROPRIATE, INCLUDING DISMISSAL, CONVERSION OR APPOINTMENT OF A CHAPTER 11 TRUSTEE OR EXAMINER BECAUSE OF NONCOMPLIANCE WITH ABOVE-REFERENCE REQUIREMENTS (Fr 12/4/14)

16 - 12-16684-LA Ch 11 VAIL LAKE RANCHO CALIFORNIA, LLC

FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT FOR FREDERICK C. PHILLIPS, SPECIAL COUNSEL, FOR DEBTOR, PERIOD: 2/3/2014 TO 12/4/2014, FEE: \$ 8,587.50, FILED BY FREDERICK C. PHILLIPS

Tentative Ruling: Court has reviewed the First and Final Application for Compensation and Expense Reimbursement of Special Counsel to the Trustee. Court finds the services necessary and, for the most part, the charges for same reasonable. However, as applicant can understand from reviewing the tentative ruling in connection with SMRH's fee application, Court is troubled by what appears to be excessive time billed to the task of getting counsel's firm employed. In what should have been a relatively routine matter, a combined amount of fees for applicant and SMRH in excess of \$6260 was billed to this task.

Court will authorize trustee to pay \$5924.50 of compensation he has requested with a holdback of \$2662.50 to permit counsel to make a further review of his services in connection with obtaining authorization of employment. If counsel determines an adjustment is appropriate such that his services in this category do not exceed \$1000, Court will permit trustee to pay an additional \$1000 as and for final compensation with the balance of counsel's request disallowed.

If counsel is prepared to accept the tentative ruling, he should notify the courtroom deputy and the SMRH representative and appearances will be excused and he should submit an order.

ATTORNEY: J. BARRETT MARUM (ADMINISTRATIVELY CONSOLIDATED DEBTORS IN, VAIL LAKE RANCHO CALIFORNIA, LLC)
ATTORNEY: RONAK PATEL (RIVERSIDE COUNTY TREASURER-TAX COLLECTOR)
ATTORNEY: ORI KATZ (ADMINISTRATIVELY CONSOLIDATED DEBTORS IN, VAIL LAKE RANCHO CALIFORNIA, LLC)

17 - 12-00206-MM Ch 11 GARCIA ENTERPRISES, LP

TELE

MOTION FOR AN ORDER TO SHOW CAUSE REGARDING CIVIL CONTEMPT FILED BY GLORIA MARTINEZ-SENFTNER, FORMER ATTORNEY FOR DEBTOR (fr. 1/8/15)

Tentative Ruling: Continued to January 29, 2015 at 2:00 p.m., Department 1. Ms. Martinez-Senftner may appear telephonically but the Debtor and his counsel must appear in person. Because there was a typographical error in the Minute Order dated January 8, 2015, requiring impossible compliance by January 5, 2015, the Court will clarify the requirements of counsel and of the Debtor. Debtor must file the current operating report and an accounting of the \$32,000.00 available to date not later than Monday January 26, 2015. The Court will issue an order to show cause why the Debtor should not be sanctioned for civil contempt and/or converted to a chapter 7 if this filing is not completed. Appearances at the January 22, 2015 hearing are excused.

ATTORNEY: FRANCISCO J. ALDANA (GARCIA ENTERPRISES, LP)
OTHER: GLORIA MARTINEZ-SENFTNER

02:00 PM

18 - 13-09506-MM Ch 11 PHILIP D. BUCCOLA

1) MOTION TO DISMISS CASE FILED BY DEBTOR

Tentative Ruling: Per unopposed motion, Debtor's motion to dismiss is granted. Debtor may upload an order after the U.S. Trustee signs off on it. Appearances are excused.

2) STATUS CONFERENCE ON CHAPTER 11 VOLUNTARY PETITION (fr. 1/8/15)

Tentative Ruling: Off-calendar. Case is being dismissed. Appearances are excused.

US TRUSTEE: MARY TESTERMAN DUVOISIN
ATTORNEY: DIANE H. GIBSON (PHILIP BUCCOLA)
ATTORNEY: KITTY BAKER (WELLS FARGO BANK)

19 - 13-09535-MM Ch 11 DENISE BUCCOLA

STATUS CONFERENCE ON CHAPTER 11 VOLUNTARY PETITION (fr. 1/8/15)

Tentative Ruling: Continued to February 12, 2015 at 2:00 pm., Department 1. Debtor must file a status report no later than February 5, 2015. Appearances at the January 22, 2015 hearing are excused.

US TRUSTEE: MARY TESTERMAN DUVOISIN
ATTORNEY: JUDITH A. DESCALSO (DENISE BUCCOLA)
ATTORNEY: KITTY BAKER (WELLS FARGO BANK)

20 - 14-00066-MM Ch 11 PATRICK ALLEN JOHANNES

OBJECTION TO PAULA LANNING'S SCHEDULED CLAIM FILED BY DEBORAH JOHANNES

Tentative Ruling: Off-calendar; Paula Lanning withdrew her scheduled claim on the record. Appearances are excused.

ATTORNEY: HOWARD MADRIS (PATRICK JOHANNES)
ATTORNEY: GREGORY M. SALVATO (DEBORAH JOHANNES)

21 - 14-03171-MM Ch 11 PUREFITNESS CARLSBAD, INC.

FIRST AND FINAL APPLICATION APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR MCMILLAN LAW GROUP, FORMER ATTORNEY FOR DEBTOR

Tentative Ruling: Continued to January 29, 2015 at 2:00 p.m., Department 1. Michael London is to address Julian McMillian's reply (Docket #312) no later than Monday, January 26, 2015, particularly addressing the 20% reduction in fees already taken by the McMillian Law Group. Appearances at the January 22, 2015 hearing are excused.

22 - 14-03531-MM Ch 7 RBE, A CALIFORNIA CORPORATION

SECOND AND FINAL FEE APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR ANDREW GRIFFIN, ATTORNEY FOR DEBTOR

Tentative Ruling: Continued to January 29, 2015 at 2:00 p.m., Department 1 to allow counsel to file a response to address the issues raised by the Court no later than January 26, 2015. Appearances at the January 22, 2015 hearing are excused.

The Court is troubled by the numerous misstatements of fact made to the Court from the inception of the case regarding the value of the accounts receivable and viability of the Debtor's operations. These issues impair the Court's ability to make the necessary findings regarding the necessity and benefit of counsel's service.

Counsel must conduct themselves to remain true to their fiduciary duties to the estate to secure their right to compensation from the estate for their services. *See, e.g., In re Count Liberty, LLC*, 370 B.R. 259, 280 (Bankr. C.D. Cal. 2007) (listing cases and noting that for "the majority of courts addressing this issue, an attorney for a debtor in possession is a fiduciary of the bankruptcy estate"). "Counsel cannot remain a passive observer, silently sitting by in the face of a client's legally unacceptable decision. Nor can the attorney simply close his eyes to matters that may have an adverse legal consequence to the estate." *Count Liberty*, 370 B.R. at 281-282; *see also In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991) (explaining that counsel may not simply accept the client's version of the facts based "on faith").

Under 11 U.S.C. § 330, applicants for compensation must demonstrate that their services were rendered for the benefit of the estate. *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 107 (B.A.P. 9th Cir. 2000). The time frame for evaluating whether the applicant's services were rendered for the benefit of the state is when the services were provided. *Id.* at 108. "The court should examine the circumstances and manner in which services were performed and the results achieved." *In re Tan, Lie Hung & Mt. States Invs., LLC*, 413 B.R. 851, 855 (Bankr. D. Or. 2009). Counsel also bears the burden to "demonstrate that the fees are reasonable." *Hale v. United States Trustee (In re Basham)*, 208 B.R. 926 (B.A.P. 9th Cir. Idaho 1997); *see also Ferrette & Slatter v. United States Trustee (In re Garcia)*, 335 B.R. 717, 720 (B.A.P. 9th Cir. 2005) ("Pursuant to 11 U.S.C.S. § 330(a) (2), the court may award compensation that is less than the amount of compensation that is requested.").

Debtor's counsel is to be prepared to address these issues at the hearing.

ATTORNEY: ANDREW H. GRIFFIN (RBE)

02:00 PM

23 - 14-08030-MM Ch 11 SHIVA-OM, INC.

1) MOTION FOR USE OF CASH COLLATERAL FILED BY DEBTOR (fr. 12/11/14)

Tentative Ruling: Continued to February 12, 2015 at 2:00 p.m., Department 1 to be heard together with the motion for relief from stay scheduled by the secured lender. Interim use of cash collateral is continued and appearances are excused.

2) MOTION FOR INSIDER COMPENSATION FILED BY DEBTOR (fr. 12/11/14)

Tentative Ruling: Granted as to final insider compensation in the amount of \$3,500.00 a month. Debtor did not file any evidence to support a higher compensation amount than provided in the interim order. See Docket #56. Appearances are excused.

3) STATUS CONFERENCE ON CHAPTER 11 VOLUNTARY PETITION (fr. 12/11/14)

Tentative Ruling: Continued to February 12, 2015 at 2:00 p.m., Department 1 to be heard together with the motion for relief from stay scheduled by the secured lender. Appearances at the January 22, 2015 hearing are excused.

ATTORNEY: ANDREW H. GRIFFIN (SHIVA-OM, INC.)

1 - 14-00915-LA Ch 7 **ALBERT F. QUINTRALL**

DEBTOR'S MOTION TO DISMISS CASE AND FOR PAYMENT OF \$30,000 IN ADMINISTRATIVE FEES CONDITIONED UPON COURT DISMISSING THIS CH. 7 CASE AND ORDERING A SIX MONTH BAR TO REFILE.

Tentative Ruling: Debtor's Motion to Dismiss **DENIED** on the terms requested by the debtor and the trustee.
Court is willing to dismiss this case outright with a 180 day bar against filing any type of bankruptcy case, but without any other conditions.

Proposed agreement between debtor and trustee is that debtor pay trustee \$30K for his trustee's fees and expenses, which fees/expenses were incurred when trustee came up with the idea to object to the debtor's homestead and sell the debtor's grossly over-encumbered residence under a carve-out agreement with the IRS who had recorded numerous tax liens against the property. [See Objection to Claims of Exemption, ECF No. 63]. The Trustee's theory was that he could carve out 15% of the net sales price -- which he thought might be sufficient to pay his administrative attorney's fees, trustee's fees, accounting fees and perhaps something towards unsecured creditors -- with the balance going to the IRS who held recorded liens. The only basis for the trustee's objection to the homestead is that the debtor had no equity in the property and he, the trustee, wanted to negotiate a carve out with the IRS [See ECF#63, p. 1:23-28] . Of course, the debtor opposed this plan of action because he intended to secure a loan modification to save his residence.

The plan of action devised by the trustee was doomed from the outset. First, he would have had to negotiate not only with the IRS, but also the FTB and EDD, each of whom had recorded liens which were in some instances senior to the IRS. There is no evidence that the trustee ever secured agreements with the other senior tax lien creditors. Second, the Trustee conceded that the "benefit" to unsecured creditors could be slight as the projected 15% of net sales--\$47,500--would be "taxed" with the trustee's fees which he was prepared to lower from the statutory amount, his attorneys' fees (estimated at \$10K+ at the time) and his accountant's fee (\$1K est.).

Court recommends the trustee review *In re KVN Corp*, 514 B.R. 1 (9th Cir BAP 2014,) which discusses the power of a trustee to sell fully encumbered property. Specifically, the reference to the requirements of the DOJ Exec. Off. for UST, Handbook for Ch. 7 Trustees is instructive:

"A chapter 7 case must be administered to maximize and expedite dividends to creditors. A trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals ... [T]he trustee must consider whether sufficient funds will be generated to make a meaningful distribution to unsecured creditors, including unsecured priority creditors, before administering a case as an asset case."

514 B.R at 6-7 (citations omitted). The Court agrees that it must view the trustee's plan of action with heightened scrutiny. The carve out strategy was unduly complex from the outset and, at best, it would have returned a meaningless pittance to unsecured creditors. Court will not approve a request for dismissal that pays the Trustee his fees for this doomed course of action.

If debtor and Ch. 7 Trustee are prepared to accept the tentative ruling, they should inform the courtroom deputy and appearances will be excused. In that event, debtor shall submit an order dismissing this case with prejudice to re-filing a bankruptcy case in any chapter for 180 days from date of entry of the order.

2 - 12-15213-LA Ch 7 LEVIMAR, LLC

- 1) OBJECTION TO PROOF OF CLAIM NO. 2, CIENA CAPITAL. FILED BY WILLIAM P. FENNELL ON BEHALF OF RONALD E. STADTMUELLER.

Tentative Ruling: Trustee's Objection to Proof of Claim No. 2 **OVERRULED**. The Trustee's cited case is inapposite. *In re Dover Mobile Estates v. Fiber Form*, 220 Cal. App. 3d 1493 (1990) was an action where the purchaser at a foreclosure sale sought to recover from the vacating tenant future rents owed under a five year lease. The state court held that the foreclosure sale terminated the 5 year lease and created a month-to-month tenancy. That case, unlike this one, did not involve past due rent.

More importantly, the Trustee's factual argument is flawed. The "granting" language in the DOT provided Ciena with a present, absolute and irrevocable property interest in the rents:

"Grantor presently, absolutely and irrevocably assigns ...for the benefit of lender all of Grantor's right, title and interest in and to all current and future leases of the Property and

all Rents from the Property and this assignment constitutes a present, absolute assignment

and not an assignment for additional security... Lender grants to Grantor a revocable license

to collect, receive and enjoy the Rents and Grantor shall hold the Rents as a trust fund In

addition, Grantor hereby grants ... a security interest in the Rents under the [UCC]."

[Ex. C, p. 3 of DOT, para j. (emphasis added)]

Therefore, upon execution of the DOT, Ciena owned the right to collect the rents and the debtor--and later the Trustee--had a license to collect and enjoy the rents, in trust, for the Lender. The foreclosure did not extinguish Ciena's rights w/r/t to the past due rents which had accrued. Nothing in the *Dover Mobile Estates* case holds to the contrary.

- 2) TRUSTEE'S MOTION FOR SURCHARGE OF COLLATERAL OF CIENA CAPITAL, LLC FILED BY WILLIAM P. FENNELL ON BEHALF OF RONALD E. STADTMUELLER

Tentative Ruling: Motion to Surcharge Collateral of Ciena Capital LLC **DENIED**. Under long-standing Ninth Circuit authority, a secured creditor's collateral may be surcharged with a portion of administrative expenses where the expenses sought to be surcharged are: (1) reasonable; (2) necessary; and (3) beneficial to the secured creditor. *In re Cascade Hydraulics and Util. Svc., Inc.* 815 F.2d 546, 548 (9th Cir. 1987). To satisfy the "benefit" prong of the test, the movant must establish "in quantifiable terms that it expended the funds directly to protect and preserve the collateral." *Id.* at 548.

The trustee has not met his burden to establish the third prong of the above-stated test. He pursued the turnover action to collect the \$177K in unpaid rents for the estate's benefit (not the secured creditor's), and primarily to create a source of payment for the estate's administrative claims. He settled the claim for only \$27K. He incurred fees far in excess of the settlement proceeds; therefore, he cannot establish that the services primarily benefited Ciena.

Even the trustee's argument of implied consent must fail. Mere cooperation with a debtor/trustee does not mean the secured creditor has consented to a surcharge. *Cascade Hydraulics*, at 548-9; *North County Place, Ltd.* 92 B.R. 437, 443 (Bankr. C.D. Cal. 1988). The trustee never asked for Ciena's express consent to a surcharge vis-a-vis a carve-out agreement. The Court cannot imply consent merely by Ciena's

Opposition to the debtor's motion to convert this case --and opposition which was also filed by the trustee -- as there is nothing in the Opposition suggesting that Ciena was consenting to the trustee's pursuit of the unpaid rents. [ECF Nos. 31, 33] Generally, implied consent has been limited to cases in which the secured creditor "caused" the trustee to take an action; to the contrary, in this case, Ciena filed a proof of claim asserting a lien on the unpaid rents as its cash collateral. The trustee's decision to pursue turnover of those rents without a carve out agreement was his own gamble for which Ciena should not be liable. *See North County Place*, at 444.

- 3) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR WILLIAM FENNELL, ATTORNEY FOR TRUSTEE, PERIOD: 1/15/2013 TO 12/4/2014, FEE: \$ 28,067.50, EXPENSES: \$146.30 (Fr 12/4/14)

Tentative Ruling: Court has reviewed the First and Final Application for Compensation and Reimbursement of Expenses filed by counsel for the Ch. 7 trustee. The Court cannot find the services "necessary" or "reasonable." While this fee application is unopposed, as pointed out by secured creditor Ciena in its Opposition (ECF No. 93) to the trustee's motion to surcharge its collateral, fees in excess of \$28K are being sought for a recovery of \$27,500--all of which this Court has found in its tentative ruling is the collateral of Ciena. Further, as pointed out in Ciena's Opposition, the litigation undertaken by the trustee's counsel was a garden-variety collection action to recover an admitted amount of back due rent. [Admitted because it was scheduled as owed in the amount of \$177K by the same person who was the principal of the LLC]. Counsel charged \$18,600 for that effort but only collected \$27,500; an experienced commercial collection firm would have charged 25% [See Opposition of Ciena, ECF No. 93, p. 5-7] of the collected proceeds or \$6,875. Clearly counsel did not charge "market" rates for a service of this nature.

Since the Court has tentatively decided to overrule the trustee's objection to Ciena's claim and to deny the trustee's request to surcharge Ciena's cash collateral for counsel's services, technically, the estate is without funds with which to pay this fee request in any event. However, the Court believes it is important to make the point here that counsel's services in this and future cases be cost-effective. If counsel is without sufficient experience to undertake certain types of legal actions efficiently, counsel should notify the trustee to seek other counsel having that experience. Further, the trustee should consider employing counsel who are undertaking collection actions on a contingency basis rather than at hourly rates so that absurdly lopsided fee requests like this one--\$28K to recover \$27.5K--are not presented to the Court.

Court will award counsel reasonable fees of \$7,500 and 100% of the costs requested in lieu of the requested amount. The balance will be disallowed.

If counsel is prepared to accept the tentative ruling, he should notify the courtroom deputy and his appearance will be excused. In that event, he may submit an order on this ruling.

ATTORNEY: DOLORES CONTRERAS (LEVIMAR, LLC)

03:00 PM

1 - 12-03427-MM Ch 13 ARTHUR & PAMELA FERREIRA

MOTION FOR RELIEF FROM STAY, RS #CJR-1 FILED BY U.S. BANK

ATTORNEY: DAVID L. SPECKMAN (ARTHUR & PAMELA FERREIRA)

ATTORNEY: CASSANDRA J. RICHEY (U.S. BANK)

2 - 14-00534-MM Ch 11 KENNETH CHARLES & MARY KATHLEEN NOORIGIAN

STATUS CONFERENCE ON CHAPTER 11 VOLUNTARY PETITION (fr.
12/11/14)

US TRUSTEE: DAVID A. ORTIZ

ATTORNEY: DAVID L. SPECKMAN (KENNETH & MARY NOORIGIAN)

3 - 14-09531-MM Ch 7 ELIZABETH HENRIETTA RIGGS

APPLICATION FOR ENTRY OF ORDER CONFIRMING NO STAY IS IN EFFECT FILED BY 2430 KELLY AVENUE TRUST

Tentative Ruling: Previously Debtor filed a chapter 13 bankruptcy petition on July 9, 2013 (Case No. 13-06996), which was dismissed on November 19, 2013. On December 9, 2013, Debtor filed her second chapter 13 petition, which was dismissed on August 20, 2014. Then she filed this bankruptcy petition on December 9, 2014.

That same day, December 9, 2014, US Financial LP filed an application for entry of order confirming no stay is in effect. In that application, US Financial stated that Case No. 13-06996 was dismissed on December 23, 2013 and Case No. 13-11797 was dismissed on October 6, 2014. This however was inaccurate because these dates were instead when the cases were closed. As stated above, the cases were actually dismissed on November 19, 2013 and on August 20, 2014.

By mistake, the Court granted the application on December 11th but upon Debtor's objection that same day, the Court vacated the order and set the matter for hearing. Even though US Financial stated in its application that the provided dates were the dates of dismissal and did not disclose that they were the dates of the cases' closing, it maintains that the date of closure is the proper date to use to determine whether a case is "pending" during the preceding one-year period as that word is used in 11 U.S.C. § 362(c). The word "pending" is not defined in the Bankruptcy Code. Black's Law Dictionary defines "pending" as "remaining undecided; awaiting decision." The definition suggests a case remains pending so long as there is something to be decided. Closing of the case is purely an administrative function that requires no substantive decision making. It would follow that a case remains pending until dismissal, not closure.

As explained in *In re Williams*, 363 B.R. 786, 788-789 (Bankr. E.D. Va. 2006), courts have routinely equated "pending" with "not dismissed." *In re Richardson*, 217 B.R. 479 (Bankr. M.D. La. 1998) (interpreting the word "pending" in the context of 11 U.S.C. § 109(g) to mandate dismissal of all cases filed within 180 days after voluntary dismissal of prior case if voluntary dismissal was requested after motion for relief from stay). See also *Hollowell v. Internal Revenue Serv. (In re Hollowell)*, 222 B.R. 790, 794 (Bankr. N.D. Miss. 1998) (concluding that the two-year look back period in 11 U.S.C. § 523(a)(1)(B)(ii) was tolled for the time the debtor's previous case was "pending," plus an additional six months after dismissal, pursuant to 26 U.S.C. § 6503(b) and (h)). Such application of "pending" in other contexts suggests that the dismissal of the case should be the relative measuring event and not the date the case is administratively closed. *In re Moore*, 337 B.R. 79 (E.D.N.C. 2005); *In re Thomas*, 352 B.R. 751, at *7, n.2, (Bankr. D.S.C. 2006).

From a policy standpoint, a case can no longer be pending once it is dismissed because the automatic stay does not protect a debtor after the earlier of dismissal or the closing of the case. *In re Moore*, 337 B.R. 79, 81 (E.D.N.C. 2005) (citing 11 U.S.C. § 362(c)(2)). The debtor no longer receives the benefit of the automatic stay after dismissal and has no control over when the case is closed after dismissal. *Id.*

Given the meaning and application of the word "pending" and given the policy considerations involved, the Court finds that a case is no longer pending once it has been dismissed. The Debtor's first case that was filed in July 2013 and dismissed on November 2013 was not pending during the one-year period preceding the filing of the Debtor's current case. But Debtor's second case that was dismissed in August 2014 was pending within the past year. As such, the automatic stay was in effect on the day that US Financial filed its motion because section 362(c)(4) (no stay in effect if two or more cases pending within a year) but the automatic stay did terminate in this case on the 30th day after this case was filed, January 9, 2015, under section 362(c)(3) (stay terminates after 30 days if

not extended if one case is pending within the year). As a result, the state court judgment is void, *see Schwartz v. United States (In re Schwartz)*, 954 F.2d 569 (9th Cir. 1992) (an act taken in violation of the stay is void ab initio); but damages from this violation, if any, can only be addressed through a properly notice motion. Regardless, as of January 9, 2015 the stay was no longer in effect.

The Court will hear this matter.

ATTORNEY: BILL PARKS (ELIZABETH RIGGS)

ATTORNEY: CHRISTINE RELPH (2430 KELLY AVENUE TRUST)